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No. 91-130

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HISPANIC BROADCASTING SYSTEMS, INC.,
a Delaware Corporation,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM OF PETITIONER HISPANIC BROADCASTING SYSTEMS, INC.

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Petitioner Hispanic Broadcasting Systems, Inc., submits the following Reply to the Brief in Opposition of the Federal Communication Commission.[1]

Petitioner offered three reasons why the novel exhaustion doctrine promulgated by the court below was in error and presented an important issue. Petitioner pointed out, in the first place, that Congress had precisely articulated the preconditions of judicial review in Section 405 of the Communications Act and that the court below had improvidently added an "earliest available corrective step" exhaustion requirement applicable to all agencies; secondly,

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[1] The Interested Parties are set out on page ii of the Petition for a Writ of Certiorari.

that the additional requirements for exhaustion elaborated by the court below were inconsistent with the basic purposes of exhaustion to prevent premature judicial action and to insure that the agency passes upon the issues; and thirdly, that the requirement of an early (and usually useless) intervention in order to challenge a possible future illegal act of an agency would improperly burden both the applicants and the agency itself.

The Commission answers each of these points by stating that, in addition to the historic offices of exhaustion, the court below reasonably added, as further requirement, "a rule requiring petitioners to comply with established deadlines in entering a proceeding it wishes to challenge." FCC Op. 10.[2] The Commission adds, "None of the cases cited by petitioner have addressed or rejected that rationale."

It is a fair question whether the court was free to add the "earliest available [application]" as a precondition to judicial review when Congress in the Communications Act has stated that the precondition for judicial review is "a petition for reconsideration" only where one is not a party to the proceeding or the agency has not had an opportunity to address the issue appealed. And that is one of the Questions Presented. But even if a failure "to comply with established deadlines" may preclude a challenge to the proceeding, it cannot preclude a challenge to the applicability of the "established deadlines" to the applicant. And the precedent of the court below so holds.

Throughout the agency proceeding, and before the lower court, Petitioner acknowledged that it had not filed its

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[2] Similarly, the Commission quotes the court of appeals to the effect that "one who seeks to overturn a Commission licensing decision in the capacity of a disappointed applicant must actually apply [for the license], and must do so in a timely fashion." FCC Op. 7, quoting Pet. App. 12a. As we show in the text, by this formulation, the court below begged the central issue of what is "timely": finding that Petitioner had not filed its application at the earliest possible moment, it held that Petitioner was estopped to argue in court that it was not required to do so.

applications within the Commission's "cut-off" dates for competing applications. Rather, it had filed its applications only when (but as soon as) the hearing officer ruled that the incumbents were not qualified for renewal because they were in violation of the Communications Act's limits on alien ownership, and the agency staff had proposed a settlement permitting these unqualified licensees to renew their license on the sole condition that they sell it immediately for $300 million dollars.

Before the original panel below, Petitioner said:

> HBS did not file its applications for SICC's television channels for the purpose of obtaining comparative consideration with SICC's applications for renewal of its license for those channels. Rather it did so in response to the administrative law judge's finding SICC in violation of Section 310(b) [alien ownership] and denying its pending applications for renewal of licenses for those channels. In the wake of these findings, the channels previously licensed to SICC became available for application by HBS and other parties. [Reply Br. at 6-7]

From the beginning, petitioners relied upon *MG-TV Broadcasting Co. v. FCC*, 408 F.2d 1257 (D.C. Cir. 1968). In that case, MG-TV filed its application long after the issuance of the construction permit, when it learned that the agency was considering a pending sale of the permit to a third party, even though the permittee had not begun construction of the station by the permit's expiration date. Section 319 of the Communications Act provides that a construction permit "shall . . . be automatically forfeited" if a station is not built within the time specified. The court held that MG-TV's application could not be rejected by the FCC because the FCC had not acted properly in allowing the sale.

The original panel below found *MG-TV* controlling (Pet. App. B, p. 35a; 893 F.2d at 1355):

> [The Commission] conceded at oral argument that if a reversal of its orders would result in vacant licenses, companies eligible to file applications for those licenses would have standing to challenge the Commission's order. *See, e.g. MG-TV Broadcasting v. FCC*, 408 F.2d 1257, 1264 n. 24 (D.C. Cir. 1968) (prospective applicant had standing to challenge assignment of a construction permit where denial of the application would have left the station vacant and available for other applications).

This case, which was central to the Petitioner's claim, both of the right to be heard by the Commission and to its standing to challenge the Commission in court, is ignored in the Commission's brief. Indeed, it is only by ignoring the case that the Commission can say that "[n]one of the case cited by the Petitioner have addressed or rejected that rationale" of the Court of Appeals. FCC Op. 10. MG-TV Broadcasting did not file a competing application within the "established deadlines in entering a proceeding"; however, it did successfully challenge the attempted transfer by the agency after the permit had become forfeit. So here, HBS did not file a competing application within the "established deadlines" after the SICC's original applications; none the less, it did apply for the licenses, and challenged the Commission's effort to permit their transfer, once they had become forfeit by the alienage of the licensee.

It is possible to ignore this precedent only by succumbing to the circular logic of the court of appeals. The court first concluded that Petitioner's application was not "timely" because it had not been filed within the "cut-off" period; then, on the basis that Petitioner was not "timely," refused to allow Petitioner to argue in court that the cut-off dates did not apply to its application under the authority of *MG-TV*.

The court's application of a "timeliness" requirement to deny the Petitioners the opportunity to invoke in court a

case which would have established the timeliness of their applications is indicative of the impropriety of such a requirement, in light of the exhaustion requirements established by Congress in Section 405. Section 405 provides, *inter alia*, that "[t]he filing of a petition for reconsideration shall not be a condition of judicial review" except where the party seeking review "relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass . . . ." In this manner, Congress, on the one hand, widely permitted judicial review to interested parties, while, on the other, assuring that the Commission would have an adequate opportunity to rule on all issues. This is the only role that timeliness is permitted under the Communications Act.

For the foregoing reasons, and for the reasons stated in the Petition for a Writ of Certiorari, it is respectfully submitted that the writ should be granted.

Respectfully submitted,

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